COUNTRY GARDEN DANGA BAY SDN BHD v. TRIBUNAL TUNTUTAN PEMBELI RUMAH & ANOR

FEDERAL COURT, PUTRAJAYA
ZALEHA YUSOF FCJ
ZABARIAH MOHD YUSOF FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 01(F)-17-07-2020(J)]
14 APRIL 2022

Abstract – *The Housing Development (Control and Licensing) Act 1966 provides very limited jurisdiction to the Tribunal for Homebuyer Claims as its s. 16N(2) limits the Tribunal's power to only entertaining claims based on a cause of action arising from the statutory sale and purchase agreement, and precludes it from enforcing terms which were not found therein. It follows that a claim based on the homebuyer's expectations that the unit purchased should correspond in all respects with the display model at the developer's showroom is not, jurisdictionally speaking, a fit and proper claim to be adjudicated before the Tribunal; such a claim cannot possibly succeed and should stand dismissed.*

ADMINISTRATIVE LAW: *Judicial review – Appeal – Judicial review against decision of Tribunal for Homebuyer Claims ('Tribunal') – Homebuyer commenced claim against developer at Tribunal – Allegation that developer gave wrong unit, in contradiction with sale and purchase agreement ('SPA') – Tribunal gave ruling to amend specifications of SPA, under para. (e) of sub-s. 16Y(2) of Housing Development (Control and Licensing) Act 1966 ('Act'), to entitle homebuyer to get unit as featured in display model – Whether s. 16N(2) of Act precludes Tribunal from exercising jurisdiction over claim not based upon express term of SPA or specifications – Whether power conferred on Tribunal, under s. 16Y(2)(e) of Act, to 'vary or set aside' contract, confers jurisdiction on Tribunal to add specifications of its own to unit purchased by homebuyer which was not provided for in SPA*

The appellant, the housing developer of Country Garden Danga Bay ('project'), entered into a sale and purchase agreement ('original SPA') with the second respondent, the purchaser of a unit of apartment of the project. The date of the original SPA was later changed. The appellant issued the notice to deliver vacant possession and the second respondent accepted the same before proceeding to renovate the unit. However, the second respondent later commenced a homebuyer's claim against the appellant at the first respondent, the Tribunal for Homebuyer Claims ('Tribunal'), premised upon the ground that the wrong unit had been given, in contradiction with the SPA *ie*, the unit he was given was an open balcony when, in fact, he was entitled to a covered balcony. A Technical Inspection Report ('report'),

carried out by a technical team, found that the unit delivered to the second respondent was in compliance with the SPA. In allowing the second respondent's claim and awarding compensation in the sum of RM50,000, the Tribunal (i) found that there were unauthorised changes to the specifications in the original SPA which had caused losses to the second respondent; and (ii) gave a ruling to amend the specifications of the SPA, under para. (e) of sub-s. 16Y(2) of the Housing Development (Control and Licensing) Act 1966 ('Act'), to entitle the second respondent to get a unit with covered balcony as the feature of the display model carrying a covered balcony was binding on the appellant ('Tribunal's decision'). Dissatisfied, the appellant filed for judicial review at the High Court, seeking an order of *certiorari* to quash the Tribunal's decision. The Tribunal's decision was upheld by the High Court and, upon appeal, by the Court of Appeal. Hence, the present appeal. The questions that arose for determination were: (i) whether s. 16N(2) of the Act precludes the Tribunal from exercising jurisdiction over a claim which is not based upon a express term of the SPA or its specifications but is a claim based on the homebuyer's expectations of the unit purchased corresponding in all respects with a display model at the developer's showroom ('first question'); (ii) whether the power conferred on the Tribunal, under s. 16Y(2)(e) of the Act to 'vary or set aside' the contract, confers a jurisdiction on the Tribunal to add specifications of its own to the unit purchased by the homebuyer to include a sheltered/covered balcony, which was not provided for in the SPA, and to award damages *in lieu* or whether the said jurisdiction is properly exercisable only to ensure that the terms of the contract are in compliance with Schedule H of the Act ('second question'); (iii) whether the homebuyer's claim, that he has been allotted the wrong unit by the developer, was maintainable after he had inspected and taken possession of and renovated the premises or whether by the law of estoppel and acquiescence, he was precluded from maintaining any such claim ('third question'); and (iv) whether a breach of natural justice occurred when the housing developer's representative at the proceedings was allotted only 15 minutes to respond to the homebuyer's allegation, made without prior notice, that his SPA was unilaterally altered and the date changed; in the circumstances, whether the Tribunal proceedings had miscarried given that legal representation is disallowed under s. 16U(2) of the Act and the fact that the Tribunal had, in the end, adopted and acted upon the extraneous material to make its award ('fourth question').

Held (allowing appeal)
Per Zaleha Yusof FCJ delivering the judgment of the court:

(1) The second respondent relied on the display model which he alleged carried units with a covered balcony which, he identified, was the type of unit he wanted to buy. The specification for a covered balcony, however, was not a term of the SPA. In fact, the report confirmed that

A the said unit delivered to the second respondent was in compliance with the SPA. The statement filed by the second respondent also made no mention of him getting a covered balcony. Therefore, the award by the Tribunal was against the provisions of the SPA and contradicted the findings in the report. (paras 25-28)

B **(2)** The Tribunal, being a creature of statute, could only act within the four walls of the statute. Although the jurisdiction of the Tribunal is set out in s. 16M of the Act, it is subject to s. 16N which provides that the Tribunal's jurisdiction shall be limited to a claim based on a cause of action arising from the SPA entered into between the homebuyer and the C housing developer. Therefore, the Tribunal was wrong when it varied the content of specifications under the SPA entered into between the appellant and the second respondent using para. (e) of sub-s. 16Y(2). The power under s. 16Y(2)(e) is a power of rectification to comply with the statutory terms provided in the Schedule. The power of the Tribunal to D vary or set aside the contract wholly or in part under s. 16Y(2)(e) of the Act is only when there is a clause in the SPA which is inconsistent with the statutory terms of the Schedule. The Tribunal did not have jurisdiction to entertain the second respondent's complaint on the covered balcony issue, which was not based on the SPA. (paras 37, 38, E 42 & 46)

(3) The second respondent could not be allowed to, on one hand, say that he got the wrong unit but, on the other hand, accept the delivery of vacant possession and renovate it. That was to approbate and reprobate the transaction. When he did the inspection during the delivery of F vacant possession, the second defendant would obviously have noticed that the unit did not carry a covered balcony and yet, he accepted it and carried on with the renovation of the unit. The Tribunal was wrong when it failed to appreciate that the second respondent had affirmed the contract as it stood on its terms which did not have a term for a covered balcony, when the second respondent accepted delivery and renovated G the unit. There was an estoppel by conduct on the part of the second respondent when he signed and accepted the vacant possession of the unit and exercised his right to ownership by renovating the unit. (paras 53 & 54)

H **(4)** The appellant was fully aware of the allegation of changes in the pages of the SPA prior to the hearing on 7 June 2018. On 15 May 2018, the second respondent informed the Tribunal that the SPA he signed and the stamped copy that was being relied on was different. The appellant's representative acknowledged that the person who signed on behalf of the I appellant was still working with the company and called her as their

witness. Therefore, it was untrue that the appellant did not have prior notice. The appellant was fully aware of the allegation of unilateral modification of the SPA about two months before the hearing. There was no element of surprise and there was no breach of natural justice. The appellant was given ample opportunity before the final hearing, before the Tribunal, to check on the documents. (paras 57, 60 & 61)

(5) The first question was answered in the affirmative; the first part of the second question was answered in the negative; the third question was answered in the negative; and the fourth question was answered in the negative. The Tribunal's decision was irrational, unreasonable and also tainted with illegality. (paras 48, 55, 63 & 64)

Bahasa Melayu *Headnotes*

Perayu, pemaju perumahan Country Garden Danga Bay ('projek'), memeterai satu perjanjian jual beli ('PJB asal') dengan responden kedua, pembeli sebuah unit pangsapuri projek tersebut. Tarikh PJB asal kemudian diubah. Perayu mengeluarkan notis milikan kosong dan responden kedua menerimanya sebelum meneruskan dengan ubah suai unit tersebut. Walau bagaimanapun, responden kedua kemudian memulakan tuntutan pembeli rumah terhadap perayu di responden pertama, iaitu Tribunal Tuntutan Pembeli Rumah ('Tribunal'), atas dasar unit yang salah telah diserahkan, bercanggah dengan PJB, kerana unit yang diserahkan padanya adalah balkoni terbuka sedangkan dia berhak menerima balkoni tertutup. Satu Laporan Pemeriksaan Teknikal ('laporan') yang dijalankan oleh pasukan teknikal, mendapati bahawa unit yang diserahkan pada responden kedua mematuhi PJB. Tribunal, dalam membenarkan tuntutan responden kedua dan mengawardkan pampasan berjumlah RM50,000, (i) berpendapat bahawa terdapat perubahan yang tidak dibenarkan pada spesifikasi dalam PJB asal yang menyebabkan kerugian pada responden kedua; dan (ii) mengeluarkan perintah meminda butiran dalam PJB, bawah perenggan (e) sub-s. 16Y(2) Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta'), untuk melayakkan responden kedua menerima unit dengan balkoni tertutup kerana ciri-ciri model pameran yang menunjukkan balkoni tertutup mengikat perayu ('keputusan Tribunal'). Tidak berpuas hati, perayu memfailkan semakan kehakiman di Mahkamah Tinggi, memohon perintah *certiorari* untuk membatalkan keputusan Tribunal. Keputusan Tribunal disahkan oleh Mahkamah Tinggi dan, berikutan rayuan, oleh Mahkamah Rayuan. Maka timbul rayuan ini. Soalan-soalan yang timbul untuk diputuskan adalah: (i) sama ada s. 16N(2) Akta mengecualikan Tribunal daripada menjalankan bidang kuasanya terhadap tuntutan yang bukan berpaksikan pada terma nyata PJB atau spesifikasinya tetapi satu tuntutan berdasarkan jangkaan pembeli rumah akan unit yang dibelinya agar sama dalam segala aspek dengan model pameran di bilik pameran pemaju ('soalan pertama'); (ii) sama ada kuasa

yang diberi pada Tribunal, bawah s. 16Y(2)(e) Akta untuk mengubah atau mengenepikan kontrak, memberi bidang kuasa pada Tribunal untuk menambah spesifikasinya sendiri pada unit yang dibeli oleh pembeli rumah agar termasuk balkoni terlindung/tertutup, yang tidak diperuntukkan dalam PJB, dan mengawardkan ganti rugi sebagai ganti atau sama ada bidang kuasa ini dijalankan dengan teratur demi memastikan terma-terma kontrak mematuhi Jadual H Akta ('soalan kedua'); (iii) sama ada tuntutan pembeli rumah, yang telah diserahkan dengan unit yang salah oleh pemaju, boleh dikekalkan selepas dia memeriksa dan mengambil milikan dan mengubah suai premis tersebut atau sama ada berdasarkan undang-undang estoppel dan persetujuan, dia terhalang daripada mengekalkan apa-apa tuntutan sedemikian ('soalan ketiga'); dan (iv) sama ada pencabulan keadilan asasi berlaku apabila wakil pemaju perumahan, semasa prosiding, hanya diberi 15 minit untuk membalas dakwaan pembeli rumah, tanpa apa-apa notis terdahulu, bahawa PJB diubah secara sebelah pihak dan tarikhnya diubah; jika begitu, sama ada prosiding Tribunal gagal kerana pewakilan perundangan tidak dibenarkan bawah s. 16U(2) Akta dan fakta bahawa Tribunal telah, pada penghujungnya, mengguna pakai dan bertindak atas perkara tidak relevan untuk membuat awardnya ('soalan keempat').

Diputuskan (membenarkan rayuan)

Oleh Zaleha Yusof HMP menyampaikan penghakiman mahkamah:

(1) Responden kedua bergantung pada model pameran yang didakwa mempamerkan unit-unit dengan balkoni tertutup yang dikenal pasti olehnya sebagai jenis unit yang hendak dia beli. Spesifikasi untuk balkoni tertutup, walau bagaimanapun, tidak terdapat dalam terma PJB. Malah, laporan mengesahkan bahawa unit yang diserahkan kepada responden kedua mematuhi PJB. Pernyataan yang difailkan oleh responden kedua juga tidak menyebut tentang dia menerima balkoni tertutup. Oleh itu, award Tribunal bertentangan dengan peruntukan PJB dan bercanggah dengan dapatan dalam laporan.

(2) Tribunal, satu rekaan statut, hanya boleh bertindak dalam batasan statut. Walaupun bidang kuasa Tribunal ditetapkan dalam s. 16M Akta, ini tertakluk pada s. 16N yang menetapkan bahawa bidang kuasa Tribunal hendaklah terhad pada tuntutan berdasarkan kausa tindakan yang timbul daripada PJB yang dimeterai antara pembeli rumah dan pemaju perumahan. Oleh itu, Tribunal terkhilaf apabila mengubah isi kandungan spesifikasi bawah PJB yang dimeterai antara perayu dan responden kedua, menggunakan perenggan (e) sub-s. 16Y(2). Kuasa bawah s. 16Y(2)(e) ialah kuasa pembetulan untuk mematuhi terma-terma statutori yang diperuntukkan bawah Jadual. Kuasa Tribunal untuk mengubah atau mengetepikan kontrak sepenuhnya atau sebahagiannya bawah s. 16Y(2)(e) Akta hanyalah apabila terdapat klausa dalam PJB

yang tidak selari dengan terma-terma statutori Jadual. Tribunal tidak mempunyai bidang kuasa melayan aduan responden kedua tentang isu balkoni tertutup yang bukan berdasarkan PJB.

(3) Responden kedua tidak boleh dibenarkan, di satu sudut, mengatakan bahawa dia menerima unit yang salah dan, di satu lagi sudut, menerima serahan milikan kosong dan menjalankan ubah suai. Ini adalah aprobat dan reprobat transaksi tersebut. Apabila dia membuat pemeriksaan ketika serahan milikan kosong, defendan kedua tentu menyedari bahawa unit tersebut tidak mempunyai balkoni tertutup tetapi dia menerimanya dan seterusnya mengubah suai unit tersebut. Tribunal terkhilaf apabila gagal mempertimbangkan bahawa responden kedua mengesahkan kontrak seperti terma sedia ada tidak mengandungi terma balkoni tertutup, sedangkan responden kedua menerima serahan dan melakukan ubah suai. Terdapat estoppel berdasarkan tindakan oleh responden kedua apabila dia menandatangani dan menerima milikan kosong unit dan menjalankan haknya terhadap milikan dengan mengubai suai unit tersebut.

(4) Perayu sedar sepenuhnya akan dakwaan pertukaran dalam mukasurat-mukasurat PJB sebelum pendengaran pada 7 Jun 2018. Pada 15 Mei 2018, responden kedua memaklumkan Tribunal bahawa PJB yang ditandatanganinya dan salinan bersetem yang dijadikan rujukannya adalah berbeza. Wakil perayu mengakui bahawa orang yang menurunkan tanda tangan bagi pihak perayu masih bekerja dengan syarikat tersebut dan memanggilnya sebagai saksi. Oleh itu, adalah tidak benar bahawa perayu tidak menerima notis terdahulu. Perayu sedar sepenuhnya tentang dakwaan pengubahan PJB secara sebelah pihak dua bulan sebelum pendengaran. Tiada elemen kejutan dan tiada pelanggaran keadilan asasi. Sebelum pendengaran akhir, perayu diberi peluang luas di hadapan Tribunal untuk memeriksa dokumen-dokumen.

(5) Soalan pertama dijawab secara afirmatif; bahagian pertama soalan kedua dijawab secara negatif; soalan ketiga dijawab secara negatif; dan soalan keempat dijawab secara negatif. Keputusan Tribunal tidak rasional, tidak munasabah dan tercemar dengan ketaksahan.

Case(s) referred to:

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Anisminic v. Foreign Compensation Tribunal (1969) 2 AC 147 ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

A *Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor [2016] 1 CLJ 893 CA* ***(refd)***
Express Newspapers plc v. News (UK) Ltd And Others [1990] 3 All ER 376 ***(refd)***
Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal [2020] 7 CLJ 720 CA ***(refd)***
O'Reilly v. Mackman (1982) 3 All ER 1124 ***(refd)***
B *Re Racal Communications Ltd (1981) AC 374* ***(refd)***
Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***
Southville City Sdn. Bhd. v. Chua Teck Kee & Anor (No 2) [2019] 1 LNS 1318 HC ***(refd)***
TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor [2017] 1 CLJ 436 CA ***(refd)***
C *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC* ***(refd)***
Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah [2004] 4 CLJ 203 FC ***(refd)***

Legislation referred to:
Consumer Protection Act 1999, s. 99(2)
D Housing Development (Control and Licensing) Act 1966, ss. 16L, 16M, 16N(2), 16O, 16U(2), 16Y(2)(e)
Housing Development (Control and Licensing) Regulations 1989, reg. 11

For the appellants - Cyrus Das, Leonard Yeoh, Chuah Chong Ping & Nurul Qarirah; M/s Tay & Partners
E *For the 2nd respondent - Viola Lettice De Cruz, Vinobha Anthony Doss & Chua Yi Xie; M/s VL De Cruz & Co*
Watching Brief:
For National House Buyers Association (HBA) - KL Wong, Koh Kean Kang & Wong Renn Xin; M/s KL Wong
For The Real Estate and Housing Developers Association Malaysia (REHDA) - Thoo Yee
F *Huan, Chong Lee Hui & Alycia Chuah Yuin Ting; M/s Halim Hong & Quek*

[Editor's note: For the Court of Appeal judgment, please see Country Garden Danga Bay Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor [2020] 1 LNS 92 (overruled); Appeal from High Court, Kuala Lumpur; Judicial Review No: JA-25-42-07-2018 (overruled).]

G *Reported by Najib Tamby*

JUDGMENT

Zaleha Yusof FCJ:

H
Introduction

[1] This appeal before us relates to the following questions of law for which leave was granted on 6 July 2020:

Question 1

I Whether s. 16N(2) of the Housing Development (Control and Licensing) Act 1966 (the Act) precludes the tribunal for homebuyer claims (hereafter called the tribunal) from exercising jurisdiction over a claim which is not based upon an express term of the sale & purchase

agreement (the SPA) or its specifications but is a claim based on the homebuyer's expectations of the unit purchased corresponding in all respects with a display model at the developer's showroom?;

Question 2

Whether the power conferred on the tribunal under s. 16Y(2)(e) of the Act to "vary or set aside" the contract confers a jurisdiction on the tribunal to add specifications of its own to the unit purchased by the homebuyer to include a sheltered/covered balcony, which is not provided for in the SPA, and to award damages *in lieu* thereof, or whether the said jurisdiction is properly exercisable only to ensure that the terms of the contract are in compliance with sch. H of the Act?;

Question 3

Whether the homebuyer's claim that he has been allotted the wrong unit by the developer is maintainable after he has inspected and taken possession of and renovated the premises or whether by the law of estoppel and acquiescence, he is precluded from maintaining any such claim?; and

Question 4

Whether a breach of natural justice occurred when the housing developer's representative at the proceedings was allotted only 15 minutes to respond to the homebuyer's allegation, made without prior notice, that his SPA was unilaterally altered and the date changed?; in the circumstances whether the tribunal proceedings had miscarried given that legal representation is disallowed under s. 16U(2) of the Act, and the fact that the tribunal had in the end adopted and acted upon the extraneous material to make its award?

[2] The appellant had filed a judicial review application in the High Court for an order of *certiorari* to quash the decision of the homebuyer claim's tribunal which allowed the second respondent's claim for damages for breach of the SPA entered into between the appellant and the second respondent. The decision of the tribunal was upheld by the High Court and on appeal, by the Court of Appeal. Hence, now the appeal before us after leave was granted.

Background Facts

[3] Salient facts can be found in the grounds of judgement of the High Court and Court of Appeal as well as the submissions of the parties. We shall reproduce them below with modification.

[4] The appellant is a licensed housing developer under the Act and a developer of a project known as Country Garden Danga Bay (the project).

[5] The first respondent is the tribunal for homebuyer claims.

[6] The second respondent is one of the house buyers of one-unit apartment of the project.

[7] On 23 August 2013, the appellant and the second respondent entered into the SPA (the original SPA) for the second respondent to purchase a unit described as parcel Block 11-A-3402 on the 34th storey (the said unit), with a purchase price of RM1,639,861. The date of the original SPA was subsequently changed to 30 December 2012. Under the original SPA, vacant possession was to be delivered within 36 months from the date of the original SPA, namely on or before 22 August 2016.

[8] However, the appellant only issued the notice to deliver vacant possession on 25 September 2017. The second respondent accepted the delivery of vacant possession on 1 November 2017. After taking vacant possession, the second respondent renovated the said unit to suit his requirements.

[9] On 2 January 2018, the second respondent brought a home buyer's claim against the appellant, the only details given were that the wrong unit had been given which contradicted the SPA: "Pemaju memberikan unit yang salah. Bercanggah SPA".

[10] The President of the tribunal who sat on 25 January 2018 directed that a technical team conduct an inspection of the said unit and submit a technical report for the first respondent's consideration. The technical report dated 15 March 2018 made a finding that the unit delivered to the second respondent was in compliance with the SPA. The following is the conclusion found in the said report:

> Tiada cadangan teknikal kerana pelan unit rumah yang diserahkan oleh pemaju sama seperti mana pelan dalam perjanjian jual beli dan pelan yang diluluskan oleh pihak berkuasa tempatan.

[11] After hearing the parties, the first respondent had given the ruling to amend the specifications of the SPA under para. (e) of sub-s. 16Y(2) of the Act to entitle the second respondent to get a unit with covered balcony as the feature of the display model carrying a covered balcony was binding on the appellant. The following is the relevant part of the ruling of the first respondent.

> Kandungan spesifikasi perjanjian jualbeli hendaklah dipinda menurut Seksyen 16Y(2)(e) Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966. Display model yang digunakan oleh PP sebagai rujukan untuk mengenalpasti unit yang dibeli oleh PYM adalah mengikat PP, iaitu bahawa PYM akan memperolehi unit yang mempunyai balcony berbumbung dan bukannya open balcony. … Jumlah kerugian yang dialami oleh PYM untuk menerima unit yang tiada balcony berbumbung dan juga spesifikasi dalaman (interior) yang berlainan adalah lebih dari RM50,000.00.

[12] The tribunal found there was sufficient evidence to support the second respondent's claim that there were unauthorised changes to the specifications in the original SPA which had caused loses to the second respondent. Hence, the tribunal allowed the second respondent's claim and awarded the second respondent compensation in the sum of RM50,000.

[13] Aggrieved, the appellant filed for the judicial review at the High Court as alluded to in para. 2 of this ground of judgment.

Issues And The Parties' Contention

[14] Before us, Dato' Cyrus Das, learned counsel for the appellant raised the following issues:

(i) The jurisdiction issue for questions 1 and 2.

(ii) The estoppel issue for question 3.

(iii) The natural justice issue for question 4.

[15] It was learned counsel for the appellant's contention that the tribunal was wrong in finding that the second respondent was entitled to a unit with a covered balcony when that was not a term provided for by the SPA. The tribunal had instead relied on the display model. Hence, learned counsel submitted, the tribunal had no jurisdiction to enforce terms which were not found in the SPA which was a statutory contract under the Act. The Act provides very limited jurisdiction to the tribunal. This can be seen from the reading of ss. 16L, 16M and 16N of the Act.

[16] On the estoppel issue, the appellant contended that the second respondent must certainly be estopped from claiming that he had been given a wrong unit by the appellant when he had taken possession of the unit delivered to him by the appellant after inspection and subsequently renovated it.

[17] On the natural justice issue, it was the appellant's contention that a breach of natural justice occurred when the appellant's representative at the tribunal proceeding was allotted only 15 minutes to respond to the second respondent's allegations, which according to the appellant were brought up for the first time at the hearing. This had rendered the decision-making process of the tribunal in breach of natural justice.

[18] On behalf of the second respondent, Mr. Viola Lattice De Cruz submitted, on the jurisdiction issue, that the provision of the Act must be read as a whole. He further submitted that sub-s. 16N(2) of the Act refers to "cause of action" arising from the SPA entered into between the home buyer and the housing developer. In this case he contended, the cause of action gave rise for the second respondent to enforce his rights, but it must be brought within the time limit set out in sub-s. 16N(2) of the Act.

[19] Therefore, learned counsel for the second respondent submitted that sub-s. 16N(2) applies to limitation period for filing the claim and not to limit the claim to the express terms of the SPA.

[20] On the display model being relied on to support the second respondent's claim, he submitted that s. 16N does not say that it has to be from the express term of the SPA but arising from the SPA. So, he contended, it was clear that the second respondent was allowed to look at matters arising out of the SPA. He also submitted that Parliament had given ample power to the tribunal to vary the sch. H agreement. Hence, although covered balcony was not provided for, the tribunal had the power to include the missing terms to give effect to the intention of the parties. He further submitted that the Act is a safeguard to protect the interest of the purchasers. A statutory agreement, he argued can be contracted out if it is favourable to the purchaser.

[21] On the estoppel issue, learned counsel for the second respondent submitted that from the moment the second respondent took possession of the said unit, he had complained to the appellant. He cited the case of *Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720 and submitted that estoppel does not operate against a statutory form of contract.

[22] Learned counsel for the second respondent also contended that there was no acquiescence on the part of the second respondent and that the second respondent did not give up his right to make a claim. In fact, the second respondent, he said, had given notice that he would take legal action.

[23] On the natural justice issue, learned counsel for the second respondent submitted, the appellant was fully aware of the allegation of changes in the pages of the SPA even prior to the hearing, as far as April 2018. Hence, there was no surprise to the appellant that can lead to a breach of natural justice.

Our Decision

(i) Questions 1 And 2

[24] As submitted by the parties, these questions relate to the jurisdiction issue. For convenience, we shall reproduce the relevant provisions of the Act, before we begin with our discussion on the issue, thus:

> 16L. A homebuyer may lodge with the Tribunal a claim in the prescribed form together with the prescribed fee claiming for any loss suffered or any matter concerning his interests as a homebuyer under this Act.
>
> **Jurisdiction of Tribunal**
>
> 16M. (1) Subject to sections 16N and 16O, the Tribunal shall have jurisdiction to determine a claim lodged under section 16L, where the total amount in respect of which an award of the Tribunal is sought does not exceed fifty thousand ringgit.

(2) Subject to subsection (1), a respondent to a claim may raise a debt or liquidated demand as:

(a) a defence; or

(b) a counterclaim.

(3) Where a respondent raises a debt or liquidated demand under subsection (2) and the debt or demand is proved the Tribunal shall:

(a) give effect to the defence; or

(b) hear and determine the counterclaim notwithstanding that the original claims is withdrawn, abandoned or struck out.

(4) Any claim lodged with the Tribunal may include loss or damage of a consequential nature.

Limitation of jurisdiction

16N. (1) Except as expressly provided under this Act, the Tribunal shall have no jurisdiction in respect of any claim:

(a) for the recovery of land, or any estate or interest in land; and

(b) in which there is a dispute concerning:

(i) the entitlement of any person under a will or settlement. Or on intestacy (including partial intestacy);

(ii) goodwill; or

(iii) any trade secret or other intellectual property right.

(2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the housing developer which is brought by a homebuyer not later than twelve months from:

(a) the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later;

(b) the expiry date of the defects liability period as set out in the sale and purchase agreement; or

(c) the date of termination of the sale and purchase agreement by either party and such termination occurred before the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later

(3) Notwithstanding subsection (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time

when the cause of action accrues if there exists a previous dealing between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation.

Extension of jurisdiction by agreement

16O. (1) Notwithstanding that the amount or value of the subject matter claimed or in issue exceeds fifty thousand ringgit, the Tribunal shall have jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal shall have jurisdiction to hear and determine the claim.

(2) An agreement may be made under subsection (1):

(a) before a claim is lodged under section 16L; or

(b) where a claim has been lodged under section 16L, at any time before the Tribunal has recorded and agreed settlement in respect of the claim under subsection 16T(3) or has determined the claim under section 16Y, as the case may be.

Awards of the Tribunal

16Y. (1) The Tribunal shall make its award without delay and, where practicable, within sixty days from the first day the hearing before the Tribunal commences.

(2) An award of the Tribunal under subsection (1) may require one of more of the following:

(a) that a party to the proceedings pay money to any other party:

(b) that the price or other consideration paid by the homebuyer or any other person be refunded to the homebuyer or that person;

(c) that a party comply with the sale and purchase agreement;

(d) that money be awarded to compensate for any loss or damage suffered by the claimant;

(e) that the contract be varied or set aside, wholly or in part;

(f) that costs to or against any party be paid;

(g) that interest be paid on any sum or monetary award at a rate not exceeding eight per centum per annum, unless it has been otherwise agreed between the parties;

(h) that the claim is dismissed.

(3) Nothing in paragraph (2)(d) or (f) shall be deemed to empower the Tribunal to award any damages for any non-pecuniary loss or damage.

(4) The Tribunal may at any time rectify or correct clerical mistake in any award or errors arising therein from any accidental slip or omission.

[25] Having perused the relevant provisions of the Act and the submissions of the parties, we now explain our decision on the first issue. As alluded to earlier, the second respondent claimed that he was given the wrong unit,

namely a unit with an open balcony, when he in fact was entitled to a covered balcony. However, from the evidence, we found that it was an undisputed fact that the specification for a covered balcony was not a term of the SPA. The second respondent relied on the display model which he alleged carried units with a covered balcony which he identified as the type of unit he wanted to buy to the sales representative.

[26] So, the main dispute here was on the second respondent's entitlement to a covered balcony. As also indicated earlier in this ground of judgment, the technical inspection report which was prepared on the instruction of the president of the tribunal had come out with the following conclusion which confirm that, as opposed to the second respondent's complaint, the said unit which was delivered to the second respondent was in compliance with the SPA; thus:

> Tiada cadangan teknikal kerana pelan unit rumah yang diserahkan oleh pemaju sama sepertimana pelan dalam perjanjian jual beli dan pelan yang diluluskan oleh pihak berkuasa tempatan.

[27] We had also perused the statement filed by the second respondent with the tribunal and found there was no mention of him getting a covered balcony claimed in the statement.

[28] Based on the above, it was plain to us that the award delivered by the tribunal was against the provision of the SPA and also contradicted with the finding in the technical inspection report. As the provision of covered balcony was not in the SPA and yet the tribunal decided to allow the second respondent's claim, the critical issue before us was whether the tribunal had such jurisdiction to enforce terms which parties admitted were not found in the SPA.

[29] The sale of this unit was obviously a controlled sale as the SPA was governed by the Act. It was indeed a statutory contract under the Act whereby the terms of the SPA as required by reg. 11 of the Housing Development (Control and Licensing) Regulations 1989 (the Regulations), incorporate the statutory terms stipulated in sch. H of the Regulations.

[30] There were abundance of authorities cited by the parties on the issue of jurisdiction of the tribunal. It would be useful for us to recite them.

[31] In *Re Racal Communications Ltd.* (1981) AC 374, Lord Diplock observed:

> … Where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for

courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.

[32] In *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697 this court observed:

> … It is an established principle that a tribunal created by statute has only such powers as are conferred by the statute which creates it … It has no inherent jurisdiction unlike the High Court … It follows that LAM had no jurisdiction to entertain the dispute between the parties. Where a tribunal makes a decision which is outside its jurisdiction it is null and void … The LAM decision is thus in that position and is of no effect.

[33] In *Anisminic v. Foreign Compensation Tribunal* [1969] 2 AC 147 Lord Pearce observed as follows:

> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that is has no jurisdiction to make.

[34] In the latter case of *O'Reilly v. Mackman* [1982] 3 All ER 1124 Lord Diplock observed:

> … if a tribunal … mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, *ie*, one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination' not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity.

[35] This court in *Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah* [2004] 4 CLJ 203 *inter alia* held:

(1) *The Tribunal has jurisdiction to hear a claim that arose from an agreement* that was entered into before 1 December 2002 and s. 16AD is also applicable to an agreement entered into before that date.

(2) The court would concur with the Court of Appeal that *the jurisdiction of the Tribunal is as provided in s. 16N(2)* of the Amendment Act. *The provision of the section, and of ss. 16N(3) and 16O(1) thereof, show that the Tribunal's jurisdiction is loosely prescribed. This reflects Parliament's intention to provide a simple forum for homebuyers to file their claim.*

(2a) The court would further agree that, under s. 16N(2), so long as the claim before the Tribunal concerned a sale and purchase agreement between a homebuyer and a licensed housing developer, and was brought by the homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation or the expiry date of the defects liability period, the Tribunal would have jurisdiction to hear the claim irrespective of the date of the agreement. This interpretation finds support in s. 16N(3) of the Amendment Act.

(3) The establishment of the Tribunal is a creation of another forum intended for speed disposal at a minimum cost of a prescribed claim up to the limit of RM25,000 by homebuyer against a licensed housing developer for breach of a sale and purchase agreement entered into between the parties. There is therefore no right of anyone being eroded or removed. (emphasis added)

[36] In the recent judgement of this court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 the court endorsed the observations made in the cases of *Sentul Raya* and *Veronica Lee* as follows:

(38) In the case of *Sentul Raya Sdn. Bhd. v. Hariram a/l Jayaram* [2008] 4 MLJ, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal said:

> The contract which has fallen for consideration in the present case is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence parties to a contract in Form H cannot contract out of the scheduled from. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contact.

(39) The Federal Court in *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2011] 2 MLJ 141 at p 144, reiterated the object of the Act by making the following observations:

> [3] Now, cl. 23 is part of a statute-based contract. In this country, the relationship between a house buyer and licensed developer is governed by the housing developers legislation. Its object is to protect house buyers against the developers. A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it.

[37] What can be deduced from the above authorities is that, the tribunal like the one herein, being a creature of statute, can only act within the four walls of the statute. For the purpose of the Act, although the jurisdiction of the tribunal is set out in s. 16M, but it is subject to s. 16N which talks about limitation of jurisdiction and s. 16O which talks about extension of jurisdiction subject to agreement. For the purpose of the appeal, we are concerned with limitation of jurisdiction of the tribunal under s. 16N.

[38] Subsection 16N(2) of the Act provides that the tribunal's jurisdiction shall be limited to a claim based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the housing developer.

[39] Learned counsel for the appellant urged us to compare the provision of the Act with the one under the Consumer Protection Act 1999 (Act 599) to which we did. Especially we compared sub-s. 16N(2) of the Act with sub-s. 99(2) of the Act 599. Just like the Act, Act 599 is also a social legislation. If the Act is meant for the protection of homebuyer, Act 599 is meant for protection of consumers. Sub-section 99(2) of Act 599 provides that: "the jurisdiction of the tribunal shall be limited to a claim that is based on a cause of action which accrues within three years of the claim."

[40] Upon comparing, it is clear to us that although both sub-s. 16N(2) of the Act and sub-s. 99(2) of Act 599 set the time frame for a claim to be made, the jurisdiction of the tribunal under Act 599 is very wide and general and not limited to the purchase agreement or its terms. Whereas under the Act, the jurisdiction of the tribunal is confined to the SPA. There has to be a SPA for a claim or complaint to be made under the Act. The SPA is a condition precedent for the tribunal's jurisdiction.

[41] In *Southville City Sdn Bhd v. Chua Teck Kee & Anor (No 2)* [2019] 1 LNS 1318, the High Court observed and we agreed:

> The court also refers to section 16N(2) of the Housing Development (Control and Licensing) Act 1966 where it states that the jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered between the homebuyer and the housing developer. **The jurisdiction of the Tribunal is only confined to the four corners of the SPA and does not include any purported agreement nor conduct outside the SPA.** (emphasis added)

[42] Hence, we found the tribunal was wrong when it varied the content of specifications under the SPA entered into between the appellant and the second respondent using para. (e) of sub-s. 16Y(2). The power under s. 16Y(2)(e) is in our view, a power of rectification to comply with the statutory terms provided in the Schedule. As such, we agreed with learned counsel for the appellant that the tribunal would have no power to rectify the SPA by the addition or exclusion of terms inconsistent with the statutory terms provided in either sch. G or H of the Regulations. The power of the tribunal to vary or set aside the contract wholly or in part under s. 16Y(2)(e) of the Act is only when there is a clause in the SPA which is inconsistent with the statutory terms of the Schedule.

[43] In *Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor* [2016] 1 CLJ 893; [2016] 2 MLJ 400 the Court of Appeal, in rejecting the recognition of collateral contracts, held:

> (41) The SPA between the respondents and the appellant, who is a housing developer, is governed by a statutory form of contract … As such, the provisions in the SPA are not merely contractual, but are in effect statutory provisions, as they are actually provisions of Schedule H of the regulations, which have been imposed by law upon the parties.

> (42) There appears to be no evidential or **legal basis to justify the existence of representations or assurances that sit alongside this statutory form SPA,** and which are binding on the parties, as the learned judge found. (emphasis added)

[44] We agree with the decision of *Encony* (*supra*). We were of the view that the tribunal had no jurisdiction over matters following outside the SPA in the form of collateral contracts, representations or warranties.

[45] In this appeal, we opined the tribunal was wrong in taking into consideration the display model instead of the SPA.

[46] To conclude on these questions 1 and 2, we were of the considered view that based on s. 16 of the Act, the tribunal did not have jurisdiction to entertain the second respondent's complaint on this covered balcony issue, which was not based on the SPA.

[47] We also agreed with learned counsel for the appellant that the power conferred upon the tribunal under s. 16Y(2)(e) to vary or to set aside the contract must be in compliance with the terms of the SPA and the power to vary and set aside can only be exercised in situation where there is inconsistency with sch. H of the Regulations.

[48] We, therefore, answered question 1 in the affirmative and the first part of question 2 in the negative.

(ii) Question 3

[49] This concerned the estoppel issue. As alluded to earlier, the second respondent had taken possession of the said unit after inspection and subsequently renovated it.

[50] In *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363; [1983] 1 MLJ 151, this court held that the conduct of the owner in accepting late delivery of the houses and subsequently ordering extra work to be done by the developer on each of the houses amounted to a waiver of his right to rescind the agreement. He is deemed to have elected the agreement as still continuing. Salleh Abas FJ (as His Lordship then was) observed as follows:

> In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing.

[51] In *TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor* [2017] 1 CLJ 436, it was held that the homebuyers were estopped from claiming rescission due to total failure of consideration for delay and defects after they had accepted vacant possession. The homebuyers continued to pay their housing loan and all other outgoings subsequent to accepting vacant possession and thus they were estopped by virtue of their conduct. It was held that if it was true that there was a total failure of consideration, a reasonable purchaser would have rejected the property at the outset and exerted his rights.

[52] In *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16; [2012] 1 MLJ 761 the Court of Appeal quoted with approval the English case of *Express Newspapers plc v. News (UK) Ltd. And Others* [1990] 3 All ER 376 as follows:

> In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v. News (UK) Ltd. and others* [1990] 3 ALL ER 376, at pp. 383-384:
>
> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. *A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.* (emphasis added)

[53] In our view, the second respondent cannot be allowed to, on one hand said that he got the wrong unit but on the other hand accepted delivery of vacant possession and renovated it. That is to approbate and reprobate the transaction. When he did the inspection during the delivery of vacant possession, the second defendant would obviously have noticed that the said unit did not carry a covered balcony; and yet he accepted it and carried on with renovation of the said unit. We were of the view that the tribunal was wrong when it failed to appreciate that the second respondent had affirmed the contract as it stood on its terms which did not have a term for a covered balcony, when the second respondent accepted delivery and renovated the said unit.

[54] We found there was an estoppel by conduct on the part of the second respondent when he signed and accepted the vacant possession of the said unit and exercised his right to ownership by renovating the unit.

[55] We, therefore, answered question 3 in the negative.

(iii) Question 4

[56] This issue arose as it was the appellant's contention that they were not given opportunity to be heard at the hearing before the tribunal as they were only allotted 15 minutes to respond to the second respondent's allegations which according to the appellant were brought up for the first time at the hearing.

[57] We had perused the appeal records. From the evidence shown, we agreed with the second respondent that the appellant was fully aware of the allegation of changes in the pages of the SPA prior to the hearing on 7 June 2018. On 15 May 2018, the second respondent informed the tribunal that the SPA he signed and the stamped copy that is being relied on is different. The appellant's representative acknowledged that the person who signed on behalf of the appellant *ie*, Chan Xin Yi, was still working with the company and called her as their witness. Therefore, it was untrue that the appellant did not have prior notice.

[58] Further, based on the statement from claimant dated 24 April 2018, the second respondent had informed the appellant of the unlawful modification of the SPA as follows:

> UNILATERAL MODIFICATION OF SPA BY DEVELOPER:
>
> SPA was signed on 26 August 2013. It contains zero attachments for the First Schedule. Details were inserted by Developer between 27 August 2013 to 30 December 2013. SPA also contains multiple cancellations, renumbering and date change (31 Dec 2013) was not endorsed by Claimant. **(Original copy of SPA & Deed of Mutual Covenant available).**

[59] The appellant had responded to the allegation sent to the tribunal amongst others, that "there is no 'fundamental error'". Further, the second respondent had on 4 May 2018 informed the tribunal and the appellant that 25 of the 26 pages of the original SPA signed on 26 August 2021 were replaced. The notes of proceedings show:

> (b) Upon investigation, owner noted that the fundamental mistake of delivering the wrong unit was concealed by Developer and/or SPA law firm removing and replacing 25 out of 26 pages of the original SPA signed on 26 August 2013. 7 additional pages were inserted without owner's consent to the benefit of the developer at the expense of owner (eg: Island kitchen removed, plot area reduced). The fraudulently amended SPA was later given a new date, 30 Dec 2013 and was sent to the respective ministries for endorsement and legalisation.
>
> (a) Developer did not deny that the SPA was swapped and the official display model was inaccurate.

[60] The appellant had responded to the claimant's letter dated 4 May 2018 as follows:

> The Respondent categorically deny and refute all allegations made by the Claimant in the Claimant's letter dated 4 May 2018. It is hereby specifically denied and refuted that "Developer did not deny that the SPA was swapped and the official display model was inaccurate". The respondent maintains that there is no "fundamental error" as alleged by

A the Claimant and that the parcel unit in question has been completed and delivered to the parcel owner in accordance with the provisions of the relevant Sale and Purchase Agreement. The Respondent reiterates that there was never any misrepresentation nor was the Claimant at any point in time misled or induced to enter into the Sale and Purchase Agreement for the parcel unit in question, namely 11a-3402.

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[61] Therefore, it was evidenced that the appellant was fully aware of the allegation of unilateral modification of the SPA about two months before the hearing on 7 June 2018 and had responded in writing prior to the hearing on 7 June 2018.

C **[62]** Hence, we agreed with the second respondent that there was no element of surprise here. We found there was no breach of natural justice and that the appellant was given ample opportunity before the final hearing, before the tribunal, to check on the documents.

[63] We, therefore, answered question 4 in the negative.

D

Conclusion

[64] For the reasons alluded to above, we unanimously allowed the appeal. We found the decision of the tribunal was irrational and unreasonable, that no sensible person who had applied the mind to the issue to be decided could
E have arrived at it. The decision was also tainted with illegality.

[65] The appeal was therefore allowed with costs of RM30,000 subject to allocator fee. We set aside the decision below and the award of the tribunal.

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